

**THE YALE JOURNAL
OF INTERNATIONAL LAW**
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Abstracts

Articles

The Indian Way of Humanitarian Intervention

Gary J. Bass 227

This Article seeks to restore India's 1971 war for Bangladesh to ongoing debates about the legality of humanitarian intervention, using recently declassified documents from Indian and U.S. archives. This momentous case reveals India's approach to international law, showing how the world's largest democracy and a major Asian postcolonial power engaged with legal norms of intervention, widening the discussion of intervention beyond Western states.

Although some political theorists have viewed India's 1971 war against Pakistan as a justifiable humanitarian intervention, international legal authorities at the time chastised India for violating Pakistan's sovereignty and threatening the international order. Rather than a Nehruvian insistence on non-intervention, India's legal approach showed considerable convergence with the arguments used by Western liberal democracies in the 1990s. India, with a complex mix of strategic and altruistic motives, justified its intervention with a series of interlocking claims: (i) an argument from human rights, (ii) an argument from genocide, (iii) an argument from self-determination, and (iv) an argument from Indian sovereignty.

While India sought multilateral support, it was widely condemned at the United Nations for an illegal unilateral intervention, with no prospect of a Chapter VII resolution to legitimize its policies. This outcome was partially due to weaknesses in India's legal case, but more the result of Cold War hostility toward India from both the United States and China. Looking forward from 1971, the Bangladesh war might be considered as part of a controversial but evolving pattern of state practice of humanitarian intervention.

A Contractual Approach to Investor-State
Regulatory Disputes

Richard C. Chen 295

International investment arbitral tribunals are increasingly tasked with resolving regulatory disputes. This relatively new form of dispute involves a challenge by a foreign investor to a host state's generally applicable regulation, enacted in good faith to promote the public interest but resulting incidentally in harm to the investor's business. Such claims typically invoke the "fair and equitable treatment" standard provided for in the bilateral investment treaty between the host state and the investor's home state. The dominant view among

commentators, and increasingly among the tribunals themselves, is that regulatory disputes should be analyzed within a public law framework, using tools derived from constitutional or administrative law. That means, for example, balancing the investor's rights and host state's regulatory concerns as part of a proportionality analysis. I argue that the public law approach is flawed because it requires tribunals to weigh incommensurable values and ultimately to make policy judgments when they lack the expertise and legitimacy to do so.

This Article proposes that tribunals instead draw on tools from contract law and theory to approximate what the contracting states intended when they agreed to a fair and equitable treatment standard. The investment treaties themselves give no guidance on how that standard should be applied to regulatory disputes. When courts confront similar gaps in contracts, they do not simply abandon the inquiry into the parties' intent but instead apply additional tools or principles to form the best possible estimate. The Article explores three specific tools: a default rule approach and two default standards derived from contract law's analysis of changed circumstances. More generally, I argue that a contractual approach, by focusing tribunals on the contracting states' intent rather than requiring them to independently assess the substance of a host state's policy, will facilitate more principled reasoning as well as enhance the tribunals' legitimacy, and thereby better promote the goals of international investment in the long run.

The Combatant's Privilege in Asymmetric and
Covert Conflicts

Jens David Ohlin 337

In armed conflicts against extraterritorial non-state actors, covert action has quickly moved from the exception to the rule. U.S. military and paramilitary forces are engaged in global drone and infantry deployments that remain officially unacknowledged by the government. However, the literature has lagged behind in not questioning how basic principles of the law of war—whose architecture depends on the link between individual combatants and the political entities they fight for—apply in covert action, which obscures and denies this link. This Article provides a deeper analysis of covert action by concentrating on the basic building block of the law of war: the privilege of combatancy—the right of lawful belligerents to kill in wartime free from criminal liability. In order to analyze this question, this Article first interrogates a deeper orthodoxy of the field: that the privilege of combatancy never applies in non-international armed conflicts. Drawing on historical and conceptual analysis, this Article concludes that the orthodox view is both simplistic and exaggerated; the more subtle answer is that government forces and rebels can qualify for the privilege in some situations, though governments retain the right to prosecute vanquished rebels for treason (but not murder). Applying this insight to asymmetric conflicts against terrorist networks, the privilege attaches to any side that meets the classical requirements for lawful belligerency: wearing a fixed emblem, carrying arms openly, maintaining a responsible command, and respecting basic customs of warfare—a standard that terrorists inevitably fail. However, government forces also fail the standard when they participate in covert action, regardless of whether the force is exercised by Central Intelligence Agency operatives or uniformed soldiers of the

Armed Forces. Individual soldiers become legitimate combatants only when they carry their arms openly and their state asserts the privilege on their behalf—a logical impossibility when the state refuses to acknowledge the use of force in the first place.

Note

Hidden in Plain Sight: The Federal Reserve's Role
in U.S. Foreign Policy

Katherine 393
Clark Harris

This Note considers the Federal Reserve Board's (FRB) role in foreign policy using a newly released data set: 1,865 pages of Federal Open Market Committee meeting transcripts from 2008. These transcripts provide a window into the important decisions made by the FRB during the recent financial crisis. This Note argues that these decisions had substantial bearing on U.S. foreign policy: (i) extending \$850 billion of international swap lines to certain nations and not others and (ii) jointly coordinating global interest rate cuts with six foreign central banks. As global markets grow more interconnected and the use of sanctions and other economic levers increase, the FRB's role in U.S. foreign policy will only become more salient. Consequently, the FRB should voluntarily issue guidelines to clarify when and how it will engage with the political branches on international matters. Voluntary guidelines strike the appropriate balance between institutionalizing coordination norms and protecting central bank independence. To date, legal scholars have only explored the FRB from an administrative law perspective. This Note moves beyond this domestic-centric focus and situates the FRB among principals and agents in U.S. foreign policy, raising new questions about central bank independence beyond the water's edge.

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